

Resolution No.:	17-801
Introduced:	June 25, 2013
Adopted:	June 25, 2013

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION  
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT  
IN MONTGOMERY COUNTY, MARYLAND**

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By: District Council

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**SUBJECT:** APPLICATION NO. G-910 FOR AN AMENDMENT TO THE ZONING ORDINANCE MAP, Stephen Z. Kaufman, Esquire, and Erin Girard, Esquire, Attorneys for the Applicant, TOWNE CREST APARTMENTS LLC, OPINION AND RESOLUTION ON APPLICATION; Tax Account No. 09-007712621

**OPINION**

Originally filed on November 9, 2011, the Applicant seeks rezoning of approximately 8.1 acres of property located at 17500 Towne Crest Drive in Gaithersburg, Maryland, from the R-T 12.5 and R-30 Zones to the PD-35 Zone. Approximately 3.58 acres are zoned R-T 12.5; the balance of the property is zoned R-30. Exhibit 60, p. 1. The Applicant requests approval of a development plan to construct 329 dwelling units in two multi-family buildings and up to 12 townhouses.

The Hearing Examiner's Report and Recommendation (ZHE Report) was filed on June 7, 2013, and is incorporated herein by reference. The Hearing Examiner recommended denial of the application for the following reasons:

1. The application does not meet the purpose clause of the PD Zone because it does not substantially comply with the Master Plan;
2. The application does not meet the purpose clause of the PD Zone to "preserve and take the greatest possible aesthetic advantage of trees and, in order to do so, minimize the amount of grading necessary for construction of a development."
3. The application does not provide the minimum amount of green area required in the PD-35 Zone.

4. One alternative development plan (Alternative A, Exhibit 124) does not comply with the minimum setbacks of the PD-35 Zone. While the other alternative does show buildings meeting the minimum setback, this setback has not been incorporated into the binding elements of the development plan.
5. The application does not meet the required mix of residential uses in the PD-35 Zone.
6. The application is not compatible with adjacent properties; and
7. Because the development plan does not substantially comply with the area master plan, it is not in the public interest.

After a careful review of the entire record, the District Council finds that the rezoning application and development plan are denied for the reasons stated in the Hearing Examiner's Report and Recommendation.

### **The Property and the Surrounding Area**

The subject property consists of 8.11 net acres (9.41 gross acres) located in the northwest quadrant of the intersection of Towne Crest Drive and Washington Grove Lane. The southern 3.58 acres (closest to Washington Grove Lane) are zoned R-T 12.5; the balance of the property is zoned R-30. Exhibit 60, p. 1.

The surrounding area is defined in a local map amendment application in order to determine the compatibility of the proposed use with the area that will be impacted by the new development. Staff defined the boundaries of the "surrounding area" as being the City of Gaithersburg boundary to the north, the Mid-County Highway to the northeast, Washington Square Park to the east, and the Town of Washington Grove (Town) to the south and west.

The Applicant agreed generally with Staff, but found the area divided by Washington Grove Lane, creating "two zones. She did this because Washington Grove Lane is a divider and the immediate surroundings are very discreet. 2/15/13 T. 162-163.

The District Council agrees with Staff's delineation of the surrounding area, as did the Hearing Examiner. The surrounding area (for the purposes of rezoning), includes those areas directly impacted by the proposed development. The Applicant asserts that residents of the development will use the MARC station within the Town, and some of the intersections studied for the purposes of Local Area Transportation Review (LATR) are located within the Town.

Two townhouse developments, Wedgewood Court Townhouses Association Nos. 1 and 2 (Wedgewood 1 and Wedgewood 2) border the eastern side of the property and are zoned R-T 12.5. To the north of the subject property are single-family detached homes in the Saybrooke community, within the City of Gaithersburg.

The subject property is bordered on west and south by the Town of Washington Grove (Town). The Town consists primarily of single-family detached homes at a density of approximately 1.08

dwelling units per acre. Originally settled in 1873, most of the Town is listed on the National Register for Historic Places. Exhibit 88(j). The Town's layout is derived from a "camp meeting design," similar to that of Chautauqua, New York, with pedestrian avenues radiating from a central circle like spokes on a wheel. Some commercial uses are located along Railroad Street along with a MARC train station. 2/25/13 T. 243-244.

About three-quarters of the property's western boundary adjoins Maple Lake Park and the West Woods, a park and forest preserve owned by the Town. The parties do not dispute that an existing stormwater outfall on the subject property has caused an erosion problem within the West Woods, which the Town characterizes as "serious". 2/25/13 T. 69; 3/4/13 T. 84. The southern portion of the western property line borders four single-family detached dwellings on Daylily Lane, also within the Town. Across Washington Grove Lane to the south of the property are single-family detached homes along Boundary Street, which forms the northern border of the Town.

Staff characterized the area immediately surrounding the property as a residential mix of apartments, townhouses, and single-family detached homes. According to Staff, the "larger surrounding area" consists primarily of single-family detached homes within the Town of Washington Grove and the City of Gaithersburg. *Id.* A church is located to the south of the property at the intersection of Washington Grove Lane and Towne Crest Drive. *Id.* at 4.

The District Council agrees with Staff's characterization of the area as a mixture of residential uses; but adds that the Town's character is somewhat more unique than a typical single-family detached suburban neighborhood. Rather, the Council characterizes the area as a suburban mix of townhouses and single-family homes within the County and the City of Gaithersburg, transitioning abruptly to the natural features and historic character of the Town of Washington Grove.

## **Proposed Development and Binding Elements**

### **Prior Development Plans**

The Applicant submitted two prior development plans requesting the PD-60 and PD-44 zoning densities. The PD-60 development plan requested 469 dwelling units in four multi-family buildings with 12.5% MPDUs. Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) never issued a recommendation on this plan, as the Applicant amended the Plan before it published its report. The multi-family buildings ranged between 3 and 5 stories in height.

The PD-44 development plan reduced the density of the project to 356 dwelling units housed in two multi-family buildings and up to 12 townhouses, also with 12.5% MPDUs. The multi-family buildings stepped up in height from three stories along Towne Crest Drive to four stories bordering the West Woods. This plan included 570 parking spaces, 64 spaces above the minimum required. Exhibit 53(a).

Technical Staff recommended approval of the PD-44 Plan, but the Planning Board recommended denial because the density requested did not sufficiently comply with the *1985 Gaithersburg and Vicinity Master Plan*.

On January 11, 2013, the Applicant submitted an amendment requesting rezoning to the PD-35 Zone, with the development plans now before the Council. Pursuant to Section 59-D-1.72 of the Zoning Ordinance, the Hearing Examiner referred the application back to the Planning Board for the opportunity to comment. Technical Staff declined this opportunity because it recommended approval of the PD-44 development plan. The Planning Board declined as well because the density proposed did not conform to the Master Plan.

### **Alternative Development Plans**

The Applicant submitted two alternative developments, both of which include 329 dwelling units in two multi-family buildings and up to 12 townhouses. The northernmost multi-family building is labeled as “Building A” on the development plan. Proceeding south on the property, the adjacent multi-family building is labeled “Building B” and townhouses are located on the southern end of the property nearest Washington Grove Lane.

The plan originally submitted for the PD-35 application (Alternative A, Exhibit 124) shows a portion of Building B setback approximately 35 feet from one of the single-family detached homes on Daylily Lane. This setback is less than the minimum of 100 feet required in the PD Zone. *Montgomery County Zoning Ordinance*, §59-C-7.15. During the public hearing, the Applicant submitted an alternative plan (Alternative B, Exhibit 125) removing Building B from the setback by relocating those units to an area above the parking deck. This setback is not, however, included in the binding elements for Alternative B. Because Alternative B substitutes two efficiency units for two two-bedroom units, one less parking space is required. The minimum parking requirement for Alternative A is 468 and the minimum parking requirement for Building B is 467 units. Exhibit 165. Both plans provide 500 parking spaces, approximately 30 spaces over the required minimum. Both alternative development plans include a binding element that 15% of the units will be MPDUs.

### **Binding Elements**

Pursuant to Zoning Ordinance §59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD Zone. This development plan must contain several elements, including a land use plan showing site access, proposed buildings and structures, a preliminary classification of dwelling units by type and number of bedrooms, parking areas, land to be dedicated to public use, and land intended for common or quasi-public use but not intended to be in public ownership. Code §59-D-1.3.

Once approved by the District Council, the development plan is binding on the Applicants except where particular elements are identified as illustrative or conceptual. The project is subject to site plan review by the Planning Board, and minor changes to the plan may be made at that time. The principal specifications on the development plan – those that the District Council considers

in evaluating compatibility and compliance with the zone, may not be changed without further application to the Council to amend the development plan.

The alternative development plans (Exhibits 124 and 125) include identical binding elements. The binding elements (from Exhibit 124) are set forth below:

1. Uses on the property are limited to Multi-Family Residential uses and Townhouse Residential units.
2. The proposed development density shall not exceed 329 units and the project shall provide MPDU's at 15% of the total number of units.
3. Proposed building heights shall not exceed 4 stories or 50 feet for Building 'A' and Building 'B' and 2 stories or 35 feet for the Townhouse units.
4. Green area shall not be less than 50% of the gross tract area, which may include abandoned right-of-way in the future.
5. The proposed development will be limited to two (2) access points from Towne Crest Drive.
6. The proposed Multi-Family Residential and Townhouse Residential Units will be setback in accordance with the Land Use Summary Table as follows: 100 feet from the Northern Property Line and 25 feet from the Western, Eastern and Southern Property Lines.

## **STANDARD FOR REVIEW**

The subject application seeks to rezone the property from the R-T 12.5 and R-30 Zones the PD-35 density category. The PD Zone falls into a zoning category known as "floating zones." A floating zone is a flexible device that allows a legislative body to establish a district for a particular type of use, with land use regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed location is appropriate for the zone, *i.e.*, it satisfies the purpose clause and requirements for the zone, the development would be compatible with the surrounding area, and it would serve the public interest.

PD (Planned Development) zones are a special variety of floating zones with performance specifications integrated into the requirements of the zone. These zones allow considerable design flexibility if the performance specifications are satisfied. The applicant is not bound to rigid design specifications, but may propose site-tailored specifications, within the parameters established for the zone, for elements such as setbacks, building heights and types of buildings. These specifications are set forth on a development plan to facilitate appropriate zoning oversight by the District Council.

Accordingly, the evaluation of zoning issues must begin with the development plan and proceed to the requirements of the zone itself. Before approving a development plan, the District Council

must make five specific findings set forth in Zoning Ordinance §59-D-1.61. These findings relate to consistency with the master plan and the requirements of the zone, compatibility with surrounding development, circulation and access, preservation of natural features, and perpetual maintenance of common areas.

In addition to these five findings, Maryland law also requires that the proposed rezoning be in the public interest. As stated in the State Zoning Enabling Act applicable to the County, all zoning power must be exercised:

- (1) guide and accomplish a coordinated, comprehensive, adjusted, and systematic development of the regional district;
- (2) coordinate and adjust the development of the regional district with public and private development of other parts of the State and of the District of Columbia; and
- (3) protect and promote the public health, safety, and welfare. Md. Land Use Article Code Ann., § 21-101(a)(4)(i).

The “Required Findings” are discussed below in the order set forth in the statute. Based on its review, the District Council concludes that, based on the evidence presented, this application must be denied.

### **Required Findings**

#### **First Paragraph: Consistency with the Sector Plan and Other County Policies**

The Council must find that the development plan substantially complies with both the relevant sector plan and does not conflict with other County plans and policies:

*It is the purpose of this zone to implement the general plan for the Maryland-Washington Regional District and the area master plans by permitting unified development consistent with densities proposed by master plans. It is intended that this zone provide a means of regulating development which can achieve flexibility of design, the integration of mutually compatible uses and optimum land planning with greater efficiency, convenience and amenity than the procedures and regulations under which it is permitted as a right under conventional zoning categories. In so doing, it is intended that the zoning category be utilized to implement the general plan, area master plans and other pertinent county policies in a manner and to a degree more closely compatible with said county plans and policies than may be possible under other zoning categories.*

The subject property lies within the geographic area covered by the 1985 Gaithersburg and Vicinity Master Plan (Master Plan or Plan).

**Land Use and Density Proposed**

The Applicants justify the densities proposed in the alternative development plans by the age of the Master Plan combined with the property's proximity to transit, the adoption of the Housing Element of the General Plan, and other general policies that have been since the Plan was adopted. In addition, they interpret the Master Plan to permit location of the total amount of density recommended for a 21-acre area (Analysis Area 2) within the subject property.

The District Council finds that the land use (i.e., multi-family) proposed conforms to the land use recommended in the plan, but finds that the density proposed does not conform to the Master Plan, as did the Hearing Examiner and the Planning Board.

The Applicant argues that all of the density permissible in Analysis Area 2 of the Plan may be located on the subject property. Such an interpretation contradicts too much of plain language of the Plan. Stickley v. State Farm Fire & Cas. Co., Court of Appeals Case No. 48, September Term, 2012, 2013 Md. LEXIS 274 (Filed Apr. 25, 2013) (The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature...which begins with the plain language of the statute, and ordinary, popular understanding of the English language dictates interpretation of its terminology.) The Planning Board's Land Use Map describes the "land use" by dwelling units per acre. Given this explicit instruction, it is difficult to construe this language to permit density on a single parcel to balloon far above the 8 – 15 dwelling units per acre recommended.

The evidence does not support the Applicant's position that the Plan took a very broad brush approach. Table 3 very accurately identifies exactly how many dwelling units had been developed in the area, a number confirmed by the Applicant's experts. 2/15/13 T. 142. Given that the Plan accurately reflected the existing development, the District Council agrees with the Planning Board and the Hearing Examiner that Table 3 should be interpreted simply to maintain the *status quo*. This is consistent with earlier language in the Plan stating that the land use recommendations for already-developed areas were made in tabular form; Analysis Area 2 clearly was one of those areas. The Plan does not prohibit any further additional development on the subject property; an additional 41 dwelling units are available for development on the property under the recommendation of 8-15 dwelling units per acre.

Nor does the zoning recommended in the Plan support the Applicant's theory. The Plan places the entire property in the R-30 Zone. The R-30 Zone permits a density of 14.5 dwelling units per net acre (17.69 dwelling units with the MPDU bonus), which is consistent with the density recommended on the Planning Board's Land Use Map.

Thus, the Council measures the density proposed against the base line recommended by the plain language of the Plan. If based on the highest density recommended (i.e., 15 dwelling units per acre with the MPDU bonus density), a maximum of 148 dwelling units could be developed on the property. Thus, the Applicant's proposed density of 329 dwelling units is more than double that recommended in the Plan.

The Applicant argues that Maryland courts have long taken the position master plans in zoning cases are more in the nature of advisory guides and that density should not be “frozen” at 1985 levels, relying on *Kanfer v. Montgomery County Council*, 35 Md. App. 715, 733 (1977)(the master plan is “at best a flexible guide”). The Town argues that, because of changes in State law, the purpose clause of the PD Zone elevates Master Plan compliance “to the level of a true regulatory device,” citing *M-NCPPC v. Greater Baden-Aquasco Citizens Association*, 412 Md. 73 (2009)(Court reversed the Planning Board’s approval of a subdivision which failed to consider master plan growth tier recommendations.)

The District Council does not find that recent changes in State law require strict compliance with the Master Plan. Section 59-D-1.62 of the Zoning Ordinance recognizes that there may be times when the Council does approve a development plan for the PD Zone with density higher than recommended in the master plan, although this requires six rather than 5 votes. One of the purposes of the PD Zone, however, is to “implement the general plan, area master plans and other pertinent county policies in a manner and to a degree more closely compatible with said county plans and policies than may be possible under other zoning categories.” *Montgomery County Zoning Ordinance*, §59-C-7.11. The Council concludes that this purpose requires the master plan to be given more weight than in other zones. Given the purpose of the Zone, the master planned density should only be exceeded when the application furthers important public policies, responds to circumstances which have changed since adoption, and when it meets other purposes and development standards in the Zone.

When considering the “appropriate density” for a property, the PD Zone permits the Council to take into account “other relevant” information in determining whether the density requested is appropriate. *Zoning Ordinance*, §7.14(b). The Applicant posits several policies to justify more than doubling the Master Plan-recommended density: (1) it will provide the additional housing called for in the Housing Element of the General Plan, (2) it will promote smart growth and transit-oriented development, and (3) it will revitalize the area. The Hearing Examiner agrees that these goals are important, but does not find the circumstances here compelling enough to justify such a large deviation from the Master Plan without a better nexus between this particular development and these general goals. Otherwise, these broader policies would swallow up the concurrent requirement for compliance with the master plan.

The District Council agrees with the Hearing Examiner that the development represents Smart Growth in the broader sense that it is located near existing services and in a priority funding area, but does not find that it represents “transit-oriented” growth, which has justified higher densities in other areas of the County. The MARC station in Washington Grove offers only limited services and is slightly further than the standard used as a reasonable “walking distance” from transit. Nothing in the record shows that this service is likely to increase in the near future. While there is one short (i.e., 5-minute) Ride-On bus route to the Gaithersburg MARC station, other routes are not direct and more lengthy. As a result, the District Council finds that the density proposed is not justified by proximity to mass transit.

In addition, other than the 15% MPDUs, there is no indication that the housing here will be “affordable” as that term is used in the Housing Element. Provision of 15% MPDUs is commendable; however, the District Council agrees with the Hearing Examiner and the Chair of



the Planning Board that it doesn't outweigh the "stark" diversion from the density recommended in the Master Plan.

The Applicant also argues that the age of the plan has rendered it obsolete and additional development is justified by changes that have occurred within the planning area. The Applicant is correct that the Council has (in a non-PD Zone cases) held that changes occurring since adoption of the Plan may justify deviations from its recommendations. *See, Council Resolution 15-1586 (Exhibit 141)*. In that case, over one-half of the original parcel was taken for construction of the Mid-County Highway. Given that circumstance, the Council found that townhouse development was suitable for the property. Even assuming that this argument applied to the PD Zone, the Applicant has failed to demonstrate that there are any circumstances specific to the planning area that have changed. Mr. Ager testified that a number of new policies have been adopted, such as the Housing Element, new stormwater management regulations, etc., but these policies would similarly apply to any redevelopment of the property. Mr. Davis testified that the surrounding area had *not* significantly changed. According to him, both construction of the Mid-County Highway and the ICC were contemplated within the 1985 Plan. Based on this evidence, the Council finds that there have been no changes to the area warranting the amount of density requested here.

This is consistent with this Council's decision in Local Map Amendment G-909. The Applicant in LMA G-909 requested rezoning to the PD-100 Zone for several properties which were recommended for lesser density in the Sector Plan. The Council recommended approval of a 15% density increase above the density recommended master plan. There are key differences between that case and the one here. In LMA G-909, the Council had already expressed its desire (in an adjacent master plan) to increase housing within the plan area. Second, the application significantly furthered several policies specific to the planning area, including the provision of TDRs, workforce housing, and MPDUs. In addition, the development truly was "transit-oriented." Located in the Battery Lane District of the Bethesda Sector Plan, it was within ½ mile of two Metro stations. Finally, the Applicant presented evidence that the BRAC relocations would create a large amount of jobs in the area, thus creating an immediate need for more housing. The Council finds that its decision in LMA G-909 does not support approval of this zoning application.

**The second required finding requires an evaluation of the PD Zone's purpose and regulations:**

*(b) That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.*

The first purpose of the Zone is compliance with the Master Plan. The Council's determinations regarding this are set forth above.

**Second Paragraph: Social and Community Interaction, Visual Character, Mix of Uses**

*[2] It is further the purpose of this zone that development be so designed and constructed as to facilitate and encourage a maximum of social and community interaction and activity among those who live and work within an area and to encourage the creation of a distinctive visual character and identity for each development. It is intended that development in this zone produce a balance and coordinated mixture of residential and convenience commercial uses, as well as other commercial and industrial uses shown on the area master plan, and related public and private facilities.*

One of the Applicant's expert land planners testified that the project's "wrap" design creates a distinctive visual character by screening public parking from the street. Amenities will include two tot lots located to serve different areas of the development. There also are a series of corridors and sitting areas, along the frontage facing Towne Crest Drive, and a pool located within an internal courtyard. To the north is a large amenity area created when density was reduced to the PD-44 Zone. No commercial uses are proposed. Technical Staff found that the common area and amenities proposed would generate a degree of social and community interaction better than the existing apartments. The District Council finds that this purpose of the PD Zone has been met.

**Third Paragraph: Broad Range of Housing Types**

Both of the alternative development plans call for a mix of single-family attached, multi-family units, with 15% of the units designated as MPDUs. The Hearing Examiner finds that this purpose has been met.

**Fourth Paragraph: Tree Preservation**

The District Council finds that this standard has not been met because the Applicant has failed to demonstrate satisfactorily that the development will not have adverse impacts on the West Woods, owned by the Town.

Technical Staff determined the development met this standard because there were few *on-site* trees to be removed but did not address the impact to off-site trees. One of the Applicant's land planners, Ms. Rodriguez, came to the same conclusion for the same reason.

The Applicant responded to the potential adverse impact on the off-site trees by asserting that it will use the "aggressive tree-save measures" to save them. It could not, however, quantify the likelihood that these would be successful. Instead, the Applicant's expert landscape architect testified that the Applicant would perform the work necessary "to save as many as possible." He could not quantify the chances of survival of the trees in the West Woods marked as "Save" on the approved Preliminary Forest Conservation Plan (PFCP), although he acknowledged that at least four may not survive.

The Town's arborist estimates that the impact on trees in the West Woods will be much greater, in part because all required trees have not been shown on the NRI/FSD and because some of the

trees are not required to be shown. The Town also submitted evidence and testimony that, even if the impacted trees survive, their life span will be significantly shortened, and will impact the ability of interior trees to survive. There is nothing in the record to refute this evidence. Perhaps of most concern is the uncontroverted evidence from the Town that loss of tree canopy (until full canopy is restored in 20 years) will exacerbate the existing severe erosion problem within the West Woods. Thus, reforestation of the area will not address the impacts to the woods.

The proposed development necessitates a waiver of the County's Forest Conservation Law (Chapter 22A, *Montgomery County Code*) to remove high priority trees located on the subject property. Staff recommended approval of the variance request because (in part) of the intensity, density, design and layout of the project. Only one reason unrelated to those was the existence of the sewer line on the western boundary of the site. Yet, the Applicant presented no expert testimony that the sewer line necessitated the removal of trees. Therefore, the question becomes whether these impacts could have been reduced by a different design, i.e., whether the flexibility in the PD Zone was used to maximize tree preservation.) The District Council finds that the Applicant has failed to demonstrate that the development meets the purpose of the PD Zone to "preserve as many trees as possible."

#### **Fifth and Sixth Paragraphs: Open Space and Pedestrian Networks**

Testimony demonstrates that the façade of the multi-family buildings facing Towne Crest Drive provides opportunities for open space where people could gather and that the Applicant used the additional area along the northern portion of the site (available when the density was reduced density) to create a stormwater feature accessible from a pathway for residents.

While the District Council does find that the design of the open space along the eastern and northern portions of the site are conducive to recreation and social activity as required, she finds that the Applicant has failed to prove that it meets the minimum required amount of green area, as addressed more specifically below. As a result, the Council finds that the development plan does not meet this purpose clause.

The Applicant presented testimony that the development would provide additional streetscape along Towne Crest Drive and Washington Grove Lane and that the Applicant will restripe the existing bus stop and install a bus shelter. The Hearing Examiner finds that the development plan fulfills this purpose of the PD Zone.

#### **Seventh Paragraph: Scale**

Technical Staff concluded that the proposed development met this purpose by providing a "more comprehensive" mix of multi-family and townhouse units. Exhibit 60, p. 15. In addition, the Applicant asserts that the "wrap" design of the project introduces a new typography of housing unit developed within the last 15-20 years to the area.

The District Council finds that the development plan does not include the mix of land uses required in the PD-35 Zone. Section 59-C-7.131 of the Zoning Ordinance requires that at least 50% of the buildings be more than four stories to encourage the large-scale development

envisioned by the plan. While the Zoning Ordinance does permit a waiver of this requirement, the Hearing Examiner finds that the Applicant has failed to demonstrate that it meets the standards for approval of a waiver, as discussed more specifically below.

**Eighth Paragraph: Compatibility and Maximum Safety, Convenience and Amenity**

Technical Staff concluded that the PD-44 development plan met this requirement because there were pedestrian and vehicular connections between buildings, sidewalk connections to Towne Crest Drive and Washington Grove Lane. It also found that stepping the building height from 3 to 4 stories helped to ensure compatibility with the developments to the east across Towne Crest Drive.

Those opposing the application disagree with Staff's assessment because they believe that a parking ratio under two spaces per unit would exacerbate an existing parking problem and because the development is incompatible with the Town.

While there is evidence demonstrating that there is a problem with overflow parking in the area, there is no evidence other than generalized fears that redevelopment will exacerbate this problem. As a result, the District Council agrees with the Hearing Examiner that those opposing the application have not demonstrated that parking problems will increase after redevelopment of the property.

As to compatibility, both the Applicant's expert land planners and the Town's expert land planners testified that the property was compatible with adjacent uses to the north, east and south. The Town continues to assert, however, that the development is not compatible with the properties along Daylily Lane and the Town's forest preserve. Because the Council finds that the project is not compatible with adjacent uses along the western property boundary, as set forth more particularly below, she finds that this standard has not been met.

**Ninth Paragraph: Summary of Required Findings**

Paragraph nine of the purpose clause states that the PD Zone "is in the nature of a special exception," and shall be approved or disapproved based on three findings:

- 1) the application is or is not proper for the comprehensive and systematic development of the county;
- 2) the application is or is not capable of accomplishing the purposes of this zone; and
- 3) the application is or is not in substantial compliance with the duly approved and adopted general plan and master plans.

This paragraph of the purpose clause does not add new requirements. Based on the preponderance of the evidence and for the reasons stated above, the Council concludes that the request for rezoning to the PD Zone in accordance with either development plan does not meet

the purposes or development standards of the PD Zone and is not compatible with the surrounding area.

### **Standards and Regulations of the PD-Zone**

The standards and regulations of the PD-Zone are summarized below, together with the grounds for the District Council's conclusion that the proposed development would satisfy some, but not all of the applicable requirements.

Section 59-C-7.121, Master Plan Density. Pursuant to Code §59-C-7.121, "no land can be classified in the planned development zone unless such land is within an area for which there is an existing, duly adopted master plan which shows such land for a density of 2 dwelling units per acre or higher." The Master Plan recommends R-30 zoning for the subject property which permits a density of 14.6 dwelling units per acre. The Planning Board's adopted Land Use Map calls for zoning between 8-15 dwelling units per acre. Based on this evidence, the District Council finds that this requirement has been met.

Section 59-C-7.122, Minimum Area. Code §59-C-7.122 specifies several criteria, any one of which may be satisfied to qualify land for reclassification to the PD Zone. The subject application satisfies the first of these criteria, which states the following:

That it contains sufficient gross area to construct 50 or more dwelling units under the density category to be granted.

The District Council finds that the subject property contains sufficient gross area to permit the construction of 50 or more dwelling units.

### Section 59-C-7.131, Residential Uses.

The PD-35 Zone, designated as "high density" requires that at least 50% of the buildings be greater than four stories in height. A waiver is permitted for if it: (1) is more desirable for stated environmental reasons than development in accordance with these limits, or (2) achieves goals, policies or recommendations stated in an approved and adopted master or sector plan. Technical Staff never addressed this issue, and the Applicant did not formally request the waiver until after the Planning Board made its recommendation on the PD-44 Plan.

The District Council concludes that the Applicant has not demonstrated that the waiver standards have been met. Other than conclusory statement from the Applicant's architect, no other evidence supports that the waiver is required for environmental reasons. *Howard County v. Dorsey*, 292 Md. 351, 358 (1982)(opinion of expert is of no greater weight than the soundness of his underlying reasons).

The Applicant's waiver request cites two portions of the Master Plan which it asserts require the waiver. The District Council agrees with the Hearing Examiner that the passages quoted by the Applicant directly relate to the need for a waiver.

The Council further finds the height was reduced to address compatibility concerns of the surrounding communities. The Council agrees with the Hearing Examiner that a waiver may not be granted for compatibility reasons alone. In general, the goal of every Master Plan is to provide compatible and systematic development for the Regional District. If this broad goal justified a waiver, then the exception would swallow up the rule.

Section 59-C-7.132, Commercial Uses. Commercial uses are permitted but not required in the PD Zone. Neither of the development plans propose any commercial use; therefore, the standards governing these uses are not applicable to the application.

Section 59-C-7.14, Density of Residential Development.

For the reasons set forth in this Resolution, the District Council finds that the density proposed on the development plans is not appropriate for the subject property.

Section 59-C-7.15, Compatibility. Section 59-C-7.15(a) provides:

*(a) All uses must achieve the purposes set forth in section 59-C-7.11 and be compatible with the other uses proposed for the planned development and with other uses existing or proposed adjacent to or in the vicinity of the area covered by the proposed planned development.*

This subsection requires that a proposed development be compatible internally and with adjacent uses. The Zoning Ordinance imposes some minimum compatibility standards to aid in this analysis. Section 59-C-7.15 imposes a minimum 100-foot setback from adjacent properties recommended in an “area master plan” for single-family detached development. This setback is imposed in order to “assist in accomplishing compatibility for sites that are not within or in close proximity to a central business district or transit station development area”.<sup>1</sup>

Under Alternative A, Building B is located 35 feet from the property at 7 Daylily Lane. The Applicant contends that the setback doesn’t apply because the single-family home is located in the Town, which has separate planning and zoning jurisdiction.

The District Council concludes that the setback applies to properties recommended for single-family detached zoning regardless of whether they are located in a municipality with separate planning and zoning authority. By its terms, the purpose of the setback is to ensure that development *on the PD Zoned site* is compatible with adjacent development. Thus, the regulation restricts land within the County, regardless of whether the adjoining single-family homes are within the Town.

The practical result of the Applicant’s theory would mean that a PD development could defeat the Council’s standard for compatibility solely by virtue of a jurisdictional boundary imposed without any relationship to zoning. There is simply no basis for this conclusion. The homes along Daylily Lane are recommended in the Town’s Master Plan for RR-2 zoning, a single-

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<sup>1</sup> This Section does permit a waiver for certain properties, but neither party contends that the development qualifies for this waiver.

family detached residential zone. Exhibit 143. As a result, the District Council finds that Alternative A does not meet the required 100-foot setback from the homes on Daylily Lane.

Alternative B *does* comply with the minimum setback in the PD Zone, although the setback is not included within the binding elements. Both expert land planners for the Applicant and the Town testified that the massing and scale of the project are compatible with development on three sides of the property: the southern, eastern and northern edges.

The District Council finds that the “Alternative B” development plan is compatible with adjacent uses on three sides, but not with land along the western boundary because of the impacts to the Town’s forest preserve. The parties are far apart on the exact impact because the Town alleges that the PFCP does not include all of the trees that need to be shown. The Applicant simply could not provide an estimate regarding the chances that the trees would survive other than “good”. They provided no evidence to refute the testimony and evidence that, even if they did survive, their life span would shorten and endanger the survival of interior trees. Nor did they address the evidence that even the temporary (over 20 years) loss of tree canopy could exacerbate the existing erosion within the West Woods.

#### Section 59-C-7.16, Green Area.

The parties differ on two of the requirements for meeting the green space requirements: (1) whether minimum amount of green area may be based on the net tract area (which the Applicant refers to as “gross area” of the development plan), and (2) whether land in the right-of-way may be counted toward the green area requirement.

The PD-35 Zone requires that 50% of the “gross area” of the property be green area. Technical Staff required the Applicant to base the green area on the gross tract area, but permitted it to include land in the right-of-way to meet that requirement. The Planning Board did not opine on the issue, requesting the Hearing Examiner instead to ensure that the full amount of green area was provided. The Applicant continues to argue that green area may be based on the net tract area of the site as long as long as the Applicant doesn’t use the gross tract area to calculate density.

The District Council concludes that the minimum percentage of green area in the PD Zone must be based on the “gross tract area” of the site based on the plain language of the Zoning Ordinance. The dictionary defines the term “gross” as “consisting of an overall total, exclusive of deductions.” *Merriam Webster Online Dictionary*; see also, *Merriam Webster’s II, New Riverside University Dictionary II* (1976)(defining “gross” as “exclusive of deductions”). Thus, the term compares the whole of something with a smaller defined portion. In this case, the Applicant acknowledges that there is no smaller area within a larger gross area; the net tract area and the gross area of the development plan are one and the same.

This is further supported because the Applicant’s interpretation would yield an unusual result: Applicants could increase or decrease the amount of green space required simply by delineating the boundary of the development plan differently, resulting in developments with different amounts of green area depending on where the boundary of the development plan is drawn.

Even if the minimum percentage of green area is defined by the gross tract area, the parties differ on whether right-of-way may be counted as green area. The District Council does not find that right-of-way may *never* be counted toward meeting the minimum green space requirement as there may be instances where DOT has reviewed a development plan and indicated that portions of the right-of-way will not be needed for improvements.

That is not the case here. The Applicant's civil engineer testified that DOT had not yet reviewed the development plan and therefore, there was no guarantee that the right-of-way may be used for this purpose. 2/25/13 T. 81-82. A commitment to the road abandonment, however, is not a binding element of the development plans and has only been preliminarily discussed with DOT. Based on this record, the District Council finds that the Applicant has failed to demonstrate that it is able to provide the minimum green area required by the PD Zone.

Section 59-C-7.17, Dedication of Land for Public Use. This section requires that land necessary for public streets, parks, schools and other public uses must be dedicated to public use and must be shown on the development plan. Technical Staff never made a finding on this issue. Exhibit 60, p. 19. The Applicant submitted a statement that all of the right-of-way for Towne Crest Drive has been dedicated, and thus none is shown on the development plan. Given this evidence, the District Council finds that this requirement has been met.

Section 59-C-7.18, Parking Facilities. Off-street parking must be provided in accordance with the requirements of Article 59-E of the Zoning Ordinance. Both alternative development plans provide the required number of spaces to support the multi-family use. While there was some testimony at the public hearing that parking at less than two spaces per dwelling unit would exacerbate an existing parking problem in the area, no one presented quantifiable evidence of this and the Council finds that this standard has been met.

### **Site Access and Circulation**

The third finding required is:

*(c) That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.*

Technical Staff found that site circulation and access for the PD-44 application was sufficient to support the use and there is no contravening testimony in the record as to the PD-35 application. For this reason, the Council finds that this standard has been met.

### **Environmental Concerns**

The fourth finding necessary to approve an application for the PD Zone requires an evaluation of environmental issues, including minimizing grading and preserving natural features on the site:

*(d) That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural*



*features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.*

Technical Staff found that this requirement has been met because little grading is needed on the site. It did not look beyond the boundaries of the site. The language above specifically references preservation of natural vegetation and other natural features “of the site.” For this reason, the Council finds that this standard has been met, but the off-site adverse impacts render the development incompatible with adjacent uses and compromises compliance with the purpose of the PD Zone.

### **Ownership and Maintenance of Common Areas**

The fifth required finding under the PD-Zone requires the Applicant to submit documents demonstrating the method of ownership and maintenance of common areas:

*(e) That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.*

Applicant’s ownership of the subject site is set forth in Exhibit 5. The Applicant has provided an affidavit as to its responsibility for perpetual maintenance of common areas (Exhibit 4), and therefore the Council finds this requirement has been met, as did the Hearing Examiner.

### **The Public Interest**

The final finding required under Maryland law is that the proposed rezoning will be in the public interest. When evaluating the public interest, the District Council normally considers Master Plan conformity, the recommendations of the Planning Board and Technical Staff, any adverse impact on public facilities or the environment and public benefits such as provision of affordable housing.


Based on the determination of the Planning Board and other evidence of record, the District Council finds that the proposed development plans do not comply with the 1985 Gaithersburg and Vicinity Master Plan and therefore the application does not further the public interest.

**Action**

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

Zoning Application No. G-910, requesting that 8.11 acres of land located at 17500 Towne Crest Drive, in the 9th Election District, under two alternative development plans specified as Alternative A and B, be, and hereby is, denied.

This is a correct copy of Council action.

  
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Linda M. Lauer, Clerk of the Council